Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

FREDRICK L. LELAND

Petitioner,

-vs-

DENNIS MORRIS, ROBERT HILLIS,
and RIVERSIDE COUNTY, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE FOURTH APPELLATE DISTRICT COURT
OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

FREDRICK L. LELAND
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Petitioner Per Se

39 pp

QUESTIONS PRESENTED

1. IF THE COUNTY HAS AN AFFIRMATIVE ACTION EMPLOYMENT POLICY TO HIRE, RETAIN AND PROMOTE CANDIDATES THAT REPRESENT AN "UNDERUTILIZE" ETHNIC CLASS, EVERYTHING BEING EQUAL, IS SUCH A POLICY A VIOLATION OF TITLE VII, EQUAL EMPLOYMENT OPPORTUNITY ACT?

2. IN PUBLISHING JOB RECRUITMENT BULLETINS REFLECTING MINIMUM JOB QUALIFICATION FOR CANDIDATES, THE COUNTY LISTS TWO OPTIONS: CURRENT COUNTY EMPLOYEES MUST QUALIFY TO COMPETE FOR VACANCIES UNDER OPTION I AND THE GENERAL PUBLIC MUST QUALIFY TO COMPETE FOR VACANCIES UNDER OPTION II. IS THIS DOUBLE STANDARD REQUIREMENT A VIOLATION OF FEDERAL LAW?

3. IF AN EMPLOYEE IS INSTRUCTED BY HIS SUPERVISOR TO GO TO COUNTY PERSONNEL AND HAVE HIS NAME ADDED TO A JOB ELIGIBILITY LIST, SHOULD THIS CONSTITUTE AN IMPLIED INDICATION THAT THE EMPLOYEE WOULD BE ALLOWED TO COMPETE FOR THE POSITION, AND THEREAFTER REFUSING TO ACCEPT HIS APPLICATION A FRAUDULENT MISREPRESENTATION?

PARTIES TO THE PROCEEDINGS

The parties to the original law suit was RIVERSIDE COUNTY, RIVERSIDE COUNTY PERSONNEL DEPARTMENT, RIVERSIDE COUNTY MENTAL HEALTH, RIVERSIDE COUNTY ALCOHOL PROGRAM, DENNIS MORRIS, JOHN RYAN, and JAMES METCALF.

The parties to the second law suit were ROBERT HILLIS, KEI OKUBO, JOHN RYAN, DENNIS MORRIS, and COUNTY OF RIVERSIDE.

A motion to consolidate the two cases for trial was granted, and during motions in limine argument, the Trial Court ordered JAMES METCALF, JOHN RYAN and KEI OKUBO dropped as defendants in the case; JAMES METCALF had died. JOHN RYAN and KEI OKUBO were not named in the complaint filed with the Fair Employment and Housing and the Equal Employment Opportunity Commissioner.

The remaining parties to the consolidated complaints are DENNIS MORRIS, ROBERT HILLIS, and RIVERSIDE COUNTY. The same are parties to the appeal in the court below.

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STATUTE **PAGE(S)**

Title VII of the Civil Rights Act LF 1964, As Amended, 42 U.S.C. 2000e et. seq. 5,7,12,13

No.

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Petitioner,

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DENNIS MORRIS, ROBERT HILLIS,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE FOURTH APPELLATE DISTRICT COURT
OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review a judgment and opinion of the Fourth District Court of Appeals entered in this case on October 22, 1995.

OPINION BELOW

The opinion and judgment by the Fourth Appellate Court of Appeals, Appellate Court, appears in Appendix "A". [The decision is unreported]. An order denying a review by the

California Supreme Court appears in Appendix "B". [Unreported].

JURISDICTIONAL STATEMENT

The opinion and order of the Appellate Court was entered on October 22, 1995, and the California Supreme Court denied the petition for review on November 1, 1995. This petition is being filed within 90 days of that date.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

After a long history of promotional denials over a period of 13 years, Petitioner filed his initial lawsuit on September 27, 1989, case number 201210, alleging Employment Discrimination Based on Race and Age; Intentional Infliction of Emotional Distress; Negligent Infliction of Emotional Distress; Negligent and Breach of Employment Contract.

In June 1990, the Program Manager, JAMES METCALF, died, and a recruitment bulletin was published seeking applicants for the position. Petitioner applied but his application was rejected with reason being he did not qualify under OPTION I of the bulletin. ROBERT HILLIS received the position, after being employed with the Alcohol Program for two years. That left his old position vacant. Petitioner had not originally applied for the position but his Supervisor instructed him to go to County Personnel and have his name added to the existing employment list.

When Petitioner's application was rejected and after promoting a white male who had been with the program for one year, on July 10, 1991, Petitioner filed his second complaint seeking damages and injunctive relief for employment discrimination, and on December 31, 1991, the Court granted a motion to consolidate the two cases. A jury trial commenced on October 20, 1992, and concluded October 23, 1992. The result of the jury trial was a ten to two verdict in favor of the Respondents.

A notice of motion for order for judgment notwithstanding the verdict was filed on October 26, 1992, and an order denying the motion was issued on December 1, 1992.

Notice of Appeal was filed on December 7, 1992, and the decision of the jury was upheld by the Appellate Court.

A petition for review was submitted to the California Supreme Court, and notice was received denying a review. A petition for a writ of certiorari was filed within 90 days.

STATEMENT OF FACTS

Petitioner was denied a promotion to Supervisor in 1976; one of two positions in 1978; once in 1981, and one of two positions in 1988. JAMES METCALF had selected white candidates over Petitioner in 1976; twice in 1978; twice in 1988, and selected a less qualified younger Mexican American in 1981.

In 1990, Petitioner was led to believe that he would be allowed to compete for a Supervisor position but his application was rejected with reason being the list of applicants had already been established.

THE 1988 PROMOTION IN QUESTION

These are the facts as of August 1988:

Petitioner was a 57 year old black male who was hired with the Program in May, 1975. He had a Business Degree and a Juris Doctor in law. Petitioner is a retired Air Force Non-Commission Officer and has a life time College Teaching Credential.

PAUL WILLIAMS was a 59 year old white male who was hired with the Program in March, 1975. He had a Masters Degree in Theology and is an ex-Catholic priest. He had a standard Teaching Credential.

ROBERT HILLIS was a 42 year old white male who was hired with the County Drug Program in May, 1974. He was promoted to Supervisor in February, 1980. HILLIS had a B.A. Degree in Biology and a standard Teaching Credential. HILLIS did not show any academic training or continuing education courses since 1969, and had no experience in Alcohol Counseling.

Since HILLIS held the position of Supervisor with the Drug Program, he requested a transfer to the Alcohol Program and was granted one of the two Supervisor positions over Petitioner in 1988.

JAMES METCALF lacked a reasonable standard procedure in selecting applicants for employment, promotions and transfers.

The Court said *Owens-Illinois* must be considered, among other factors, such as: the applicants' job qualifications, disciplinary record, attendance and medical record, length of service, experience, education, prior training, job performance rating, interest in the position and any other factor unique to the vacancy. *Harris v. Owens-Illinois*, 665 F.2d. 918 (1982).

In *Brown v. Gaston County Dyeing Machine Co.* at 457 F.2d. 1337, the Court said, "lack of [a] fixed or reasonable objective standards and procedures for hiring identified as a discriminatory practice."

Throughout the trial, witnesses testified that WILLIAMS and HILLIS were more qualified for the two positions than Petitioner.

In *Aikens*:

> "the District Court errors in requiring Aikens to show, as part of his prima facie case, that he was, as qualified or more qualified than the people who were promoted. The District Court erroneously thought that respondent was required to submit direct evidence of discriminatory intent, and erroneously focused on the question of prima facie case rather than directly on question of discrimination."

> "By establishing a prima facie case, the plaintiff in a Title VII action creates a rebuttable presumption that the employer unlawfully discriminated against him."
>
> *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 715; 103 S. Ct. 1478, (1983). *Texas Department of Community Affairs v. Burdine*, 450 U.S. 254; 101 S. Ct., 1094. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817; 36 L.Ed. 668, (1973).
>
> "To rebut the presumption, the defendant must clearly set forth, through the introduction of admissible evidence the reasons for the plaintiff's rejection. In other words, the defendant must produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate non-discriminatory reasons." *Aikens, supra*.

In trying to articulate a non-discriminatory reason for not promoting Petitioner, in August, 1988, the Appellate Court, at Appendix "A", pages 2 and 3, stated:

> "Mr. HILLIS had been in the County's drug program for approximately thirteen years, eight of which he had served as a Supervisor. Because of his position in the drug program, he was informed that his application

> for Supervisor position in the Alcohol Program would be treated as a lateral transfer and he need only file a written request to have his name added to the list of applicants."

This statement indicated that the County does not have a fixed or reasonable objective standards and procedures for evaluating applicants for transfers.

The Appellate Court further stated:

> "Mr. WILLIAMS had been a member of the Alcohol Program longer than Leland. During the early years of his employment, Mr. WILLIAMS' performance was not above-average. However, prior to 1988, he obtained important counseling training in 'interventionist' treatment."

Judging from the testimony of DR. VAN NESS, it appears that it is prudent to promote a white applicant with a mediocre work record over Petitioner who had a very clean, very solid work history.

The Appellate Court went on to say at Appendix "A", page 3:

> "Furthermore, the County utilizes an affirmative action policy which seeks in limited situations to retain employees with a similar demographic background to the general population of Riverside

> County. The County's policy is limited to situations in which two or more candidates for a position are deemed to be equally qualified for a position. If one of the equally-qualified candidates belongs to a group which is significantly under-represented among similarly situated County employees ('under-Utilized'), the County will retain the candidate from the under-utilized group."

While this policy may insure the hiring and promotion of minorities and women, it could be used to deny well qualified minorities employment and promotional opportunities in favor of less qualified white candidates where it is shown that blacks are not "under-utilized", as the County claimed when they denied Petitioner a promotion in 1988.

This policy would also apply to whites as an "under-utilized" class yet whites have not been classified as a protected class, or has shown a history of race discrimination.

In *Local 28*, the opponents of Title VII charged that employers and labor unions would be required to implement racial quoters or preferences to avoid liability under the statute. Supporters insisted that Title VII did not require "racial balancing."

> "The Court should exercise its discretion with an eye toward Congress' concern that affirmative

rate-conscious measures not be invoked simply to create a racially balanced work force. Title VII was designed to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees."

Local 28 of the Sheet Metal Workers International Association v. Equal Employment Opportunity Commissioner, et al., 478 U.S. 421; 92 L.Ed. 2d. 344; 106 S. Ct. 3019, (1986). *Griggs v. Duke Power Co.*, 401 U.S. 424, 429, 430; 91 S. Ct. 849, 853; 28 L.Ed. 2d. 158, (1971). *Teamsters v. United States*, 431 U.S. 364, 365; 97 S. Ct. 1869, (1970). *Franks v. Bowman Transportation Co.*, 424 U.S. 763, 771; 96 S. Ct. 1263, 1264, 1267. *Albermerle Paper Co. v. Moody*, 422 U.S. 417, 418; 95 S. Ct. 2371, 2372.

MISTAKEN VIEW OF THE LAW

In denying the motion for judgment notwithstanding the verdict, the Trial Court said: "Just the testimony of the defendants that they did not discriminate against you is sufficient evidence upon which the jury could conclude that that was not a basis for you not getting the job." The Appellate Court, Appendix "A", page 13, stated: "No one ever told Leland that he was not considered for the

available positions because of his age and race."

Such statements clearly indicate that the jury and Appellate Court made a grave mistake in applying the law of employment discrimination.

As this Court stated in *Aikens, supra.*:

> "There will seldom be 'eyewitness' testimony as to the employer's mental process."

The Court stated in *La Montagne*:

> "[e]ven an employer who knowingly discriminates -- may leave no written records revealing the forbidden motive and may communicate it orally to no one."
>
> *La Montagne v. American Convenience Prods., Inc.*, 750 F.2d. 1405, 1410.

The statements made by the Trial Court and the Appellate Court raise some confusion as to the proper application in the law. This Court also said in *Aikens, supra.* ". . . it is not clear that its findings of facts in favor of the Postal Services were not influenced by its mistaken view of the law; accordingly, the case is remanded so that the district court may decide on the basis of the evidence before it whether the Postal Service discriminated against Respondent."

A writ of certiorari should be issued based on these statements alone.

DOUBLE-STANDARD IN RECRUITMENT

In 1990, Respondents published a job bulletin that had a double-standard: One requirement for current County employees and one requirement for the general public, called OPTION I and OPTION II.

Under the minimum qualifications for the position, the following is listed:

OPTION I: One year experience as a Supervising, Substance Abuse counselor or Substance Abuse Control Consultant with the County of Riverside.

OPTION II: Require certain education and Supervisory or Administrative experience in a formally structured community service or social rehabilitation program. However, it is OPTION I that Petitioner claims is discriminatory.

While OPTION I prevents all current County employees from competing for the position, that did not meet the qualifications under OPTION I, it eliminated <u>all</u> black current County employees from competing for the position. In 1990, out of some 12,000 current County employees, not one black employee with the County could qualify to compete under OPTION I.

The Appellate Court seriously misconstrued the trial transcript.

> ". . . the requirements did not preclude a black woman from qualifying as one of the five finalists for the position."

PATTY SPAUGY testified that the intent of OPTION II of the requirement bulletin was to allow outsiders to compete for the position. JOHN RYAN testified that the woman he interviewed had equivalent experience to Mr. HILLIS in terms of the public sector. "Just so I keep my thinking straight, she had been a supervisor in the private sector."

Therefore, the black woman the Appellate Court mentioned was not a current County employee.

JOHN RYAN appears to have violated the County's affirmative action policy. Everything being equal, the County will retain the candidate from the under-utilized group. At the time black Substance Abuse Program managers were under-utilized, (0 utilized), in mental health, yet he selected a white candidate over a black female.

The Appellate Court also seriously misconstrued the trial transcript by stating that, "the minimum qualifications for the position as follows: (a) "[o]ne year of experience as a Supervising Substance Abuse Counselor or Substance Abuse Consultant with the County" OR (b) an educational requirement and "one year of supervisory or administrative experience in a formally structured community service . . ." *Appendix "A-5"*

The recruitment bulletin was not an [a] OR [b] option bulletin. It is just what Petitioner says it is, a double-standard bulletin. Current County employees had to qualify under OPTION I and the general public had to qualify under OPTION II.

Federal law bands against printing or publishing job notices indicating preferences based on race or color is absolute. As a result, it is unlawful for an employer, labor organization, joint labor management, apprenticeship committee or employment agency to specify "colored" or "white" in help wanted ads or to permit job ads to be listed in racially segregated column. Specifying certain educational requirement is discriminatory since it has the predictable result of disqualifying minority job seekers at a higher rate than non-minorities.

Similarly, help wanted ads specifying that applicants not have arrest records are generally considered unlawful because they tend to have a racially based impact dissuading minority job seekers at a disproportionate rate. *Gregory v. Litton Systems, Inc.*, 472 F.2d. 631, (1972).

The Court found that the apparently racially-neutral questionnaire actually operated to bar employment to black applicants in far greater proportion than white applicants, and showed no reasonable business purpose for continuing to ask prospective employees about their arrest records. *United States v. Sheet Metal Wkrs. Int., Ass'n Local U. 36*, 416 F.2d. 123 (1969).

Since the recruitment bulletin acted to reject all current black County employees from competing for the Program Manager's position, it would be no different if the ad had said "only whites need apply" OR "only non-Blacks need apply."

DISCHARGE OF JOHN RYAN WAS IN ERROR

As a general rule, an employer is liable under Title VII for the discriminatory acts of its managerial and supervisory employees acting within the scope of their authority. *Levendos v. Stern Entertainment, Inc.*, 909 F.2d. 747, (3rd Circ. 1990).

JOHN RYAN is the Program Director of Mental Health and the Supervisor of JAMES METCALF. The Appellate Court should have found that RYAN was responsible for METCALF's action while acting within the scope of his authority. RYAN could be identified as the "Employer" in the claim to FEHC.

THIS CASE PRESENTS IMPORTANT CONSTITUTIONAL ISSUES INVOLVING THE HIRING, PROMOTION AND TRANSFER POLICY OF THE COUNTY OF RIVERSIDE

This Court has consistently held that when the defendant fails to persuade the District Court to dismiss the action for lack of prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the plaintiff's rejection, the fact-finder must then decide whether the rejection was discriminatory within the meaning of Title VII. At this stage the *McDonnell-Burdine* presumption "drops from the

case and the factual inquiry proceeds to a new level of specificity" *Burdine, supra., Aikens, supra.*

The trier-of-fact must now determine whether it is more likely than not that such actions were "based on a discriminatory criterion illegal under the act." *Furnco Construction Corp. v. Waters*, 438 U.S. 567.

CONCLUSION

In view of the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Appellate Court.

Respectfully Submitted,

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Petitioner Per Se

Dated: January 20, 1996

APPENDIX A

COURT OF APPEAL, FOURTH DISTRICT
DIVISION TWO
STATE OF CALIFORNIA

FREDRICK L. LELAND,

Plaintiff/Appellant,

-vs-

COUNTY OF RIVERSIDE, et al.,

Defendants/Respondents.

OPINION

E012025

(Super. Ct. No. 201210
Consol. With 212784)

August 22, 1995

APPEAL from the Superior Court of Riverside County. Robert K. Garst, Judge. Affirmed.

Fredrick L. Leland, in pro per, for Plaintiff and Appellant.

Roberts & Morgan and Dennis E. Wagner, Greines, Martin, Stein & Richland, Martin Stein and Randel L. Ledesma for Defendants and Respondents.

Plaintiff, Fredrick L. Leland ("Leland"), appeals from the jury verdict in favor of defendants contending that the trial court committed several errors which may have incorrectly influenced the jury's decision. Alternatively, he argues that the trial court should have granted his motion for judgment notwithstanding the verdict. Finding no errors, we affirm.

FACTS

"We state the facts in the light most favorable to the judgment, giving the prevailing party the benefit of every reasonable inference and resolving conflicts in support of the judgment. [Citation.] Although the foregoing is elementary black letter law, we reiterate it at the outset of our factual recitation because [Leland] in essence asks that we resolve the considerable evidentiary conflicts in [his] favor, contrary to our obligation under the law." (Watson v. Department of Rehabilitation (1989 212 Cal.App.3d 1271, 1279.)

Since 1975, Leland had been employed by the County of Riverside ("County") as a substance abuse counselor. The alcohol and substance abuse programs are operated under the County's Mental Health Department.

In 1988, two supervisory substance abuse counselor positions were made available in the alcohol program and Leland applied for one of them. These positions required additional specialized training and personnel management skills. Competing against Leland were Robert Hillis and Paul Williams. Mr. Hillis had been in the County's drug program for approximately

thirteen years, eight of which he had served as a supervisor. He has a master's degree in counseling. Because of his position in the drug program, he was informed by the personnel office that his application for supervisor position in the alcohol program would be treated as a lateral transfer and he need only file a written request to have his name added to the list of applicants.

Mr. Williams had been a member of the alcohol program longer than Leland. During the early years of his employment, Mr. Williams's performance was not above average. However, prior to 1988, he had obtained important counseling credentials, including training in "interventionist" treatment.

The director of the alcohol program, James Metcalf, interviewed the applicants for the supervisory positions. Ultimately, Messrs. Hillis and Williams were chosen. According to one of Leland's prior supervisors, Dr. Michael Van Ness, Mr. Hillis was clearly more qualified than Leland, and Mr. Williams had gone the extra mile by obtaining credentials which Leland did not have.

As a result of not obtaining either of the supervisory positions, Leland filed a grievance with the County accusing Mr. Metcalf of being "a racist." Leland's grievance was processed and the arbitrator denied any recovery. Leland then filed a complaint with the D.F.E.H. ("DFEH")[1] which issued a "right to sue" letter. Thus, on September 27, 1989,

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[1]Department of Fair Employment and Housing.

Leland filed his civil complaint alleging employment discrimination, intentional and negligent infliction of emotional distress, negligence, and breach of contract regarding his failure to obtain the supervisor position.

In 1990, Mr. Metcalf died and the position of program manager of the alcohol program became available. The County's personnel department issued a recruitment bulletin which stated the minimum qualifications for the position as follows: (a) "[o]ne year of experience as a supervising substance abuse counselor or substance abuse consultant with the County"; or (b) an educational requirement and "one year of supervisory or administrative experience in a formally structured community service or social rehabilitation program providing substance abuse prevention[,] treatment[,] or rehabilitation services."

Leland attempted to apply for the position; however, his application was rejected by the personnel department because he had failed to prove that he had one year of experience as a supervisor or administrator in the substance abuse community rehabilitation program. Leland contacted Patty Spaugy of the personnel department and claimed that his work record and military record were sufficient to satisfy the recruitment's experience requirements. In response, Ms. Spaugy testified that she had invited Leland to submit further information to support his application, but he failed to do so.

Because his application had been rejected, Leland filed a DFEH claim. He claimed that the experience requirements had

been drafted to exclude him and other Blacks from applying. However, the County's internal investigation revealed that the requirements for the position had been prepared three years before the position became open. Moreover, the requirements did not preclude a Black woman from qualifying as one of the five finalists for the position.

Ultimately, the position went to Mr. Hillis. In comparing Mr. Hillis to Leland, Leland's present supervisor, Henry Guiterrez, testified that Mr. Hillis was more qualified to serve as program manager. Dr. Van Ness also opined that Mr. Hillis was the more logical choice. On November 6, 1990, Leland amended his civil complaint to allege claims regarding his failure to obtain the position of program manager.

Mr. Hillis's promotion left an opening in his former position as a supervisor in the alcohol program. Mr. Hillis received a list of eligible applicants and noticed that it did not include some of the people from his department whom he knew would be interested. Thus, he contacted Leland, Lewis Gray and Julian Monteon and suggested that they submit their applications.

When Leland tried to submit his application, he was told that the personnel office was not accepting any more applications for the position because it had already established an eligibility list. Earlier in the year, a pair of recruitment bulletins had been issued. They were notices regarding two supervisor positions -- a position in the drug abuse program in Riverside and a position in the alcohol program in Indio. Applicants were

allowed to indicate their preference for one position and/or location. From these applicants, the personnel department created an eligibility list to be used for any supervisor position which became available during the following six months. Thus, when Mr. Hillis's former position became open, the personnel department did not circulate a new recruitment bulletin.

Leland had not previously submitted an application in response to the initial recruitment bulletin because he was not interested in working in Indio. When he attempted to submit his application for Mr. Hillis's former position, it was rejected because the personnel office had already established its list of eligible candidates and was not recruiting for any more. Using the eligibility list, Mr. Hillis selected Rick Smith for the vacant supervisor position.

On July 10, 1991, Leland filed a new complaint seeking damages and injunctive relief for claims of employment discrimination in connection with his failure to obtain the position of supervising substance abuse counselor. On December 31, 1991, plaintiff's two actions were consolidated.

DID THE TRIAL COURT COMMIT ANY ERROR REQUIRING A REVERSAL OF THE JUDGMENT?

Before we reach Leland's primary contention that the verdict is not supported by substantial evidence, we must first dispose of his preliminary contentions, i.e., that the trial court committed four errors which warrant a reversal of the judgment.

First, Leland complains that he was precluded from introducing evidence regarding "hiring practices within the Alcohol Program." In support of his complaint he cites too the following passage from the reporter's transcript:

"Q (BY MR. LELAND:) I'd like to go to some of the hiring processes within the alcohol program and I'd like to ask you: Do you know Mr. Weldon Jackson?

"A Just barely from a lot of years ago.

"Q Did Mr. Jackson ever work for the alcohol program?

"A Yes. Although that may have been as a contractor, but, yes, he did.

"MR. WAGNER: Excuse me, Judge, frankly, I think we might need a side bar on this.

"MR. LELAND: May I respond? It goes to impact.

"THE COURT: Well, it seems better to have a side bar. Come on in.

"(Off the record discussion at the bench.)
"THE COURT: For the record, the objection is sustained."

Based upon the above citation, we are unable to determine whether or not Leland was precluded from inquiring into the hiring processes within the alcohol program because he failed to make his record for appeal. Instead, he asks us to blindly accept his

contention that the result of the side bar discussion was to deny him the opportunity to present evidence of the hiring processes. However, the side bar discussion commenced upon the introduction of the name Weldon Jackson. We do not know what role Mr. Jackson played in the hiring processes, nor will we assume that he played a role. Our review is "limited to . . . matters appearing of record." (Grimshaw v. Ford Motor Co. (1981) 119 Cal.App.3d 757, 792.) Thus, we find no merit to Leland's first complaint.

Second, Leland claims that he was precluded from introducing any evidence regarding his claim of retaliatory discrimination when the trial court said, ". . . if a claim has not been presented under the Fair Employment Housing Act for retaliatory discrimination, then it would preclude claiming that at this point. That would be a cause of action which wasn't a basis of claim." Contrary to the trial court's statement, he contends that his failure to specifically state that he was a victim of retaliatory discrimination in his administrative charge was not fatal to such allegation in his complaint. (Baker v. Children's Hospital Medical Center (1989) 209 Cal.App.3d 1057.) In response, defendants argue that Leland was never precluded from introducing evidence of retaliatory discrimination because the trial court never made any ruling on this issue. Instead, they point out that Leland has cited only to one statement made by the court during a side bar discussion which resulted when he objected to a question regarding "other illegal discrimination." Both parties' arguments have merit.

Leland's argument asks us to find that his claim of retaliatory discrimination is "like or reasonably related" to his claim of racial discrimination. We note that "[b]oth California courts and those from other jurisdictions have endorsed the 'like or reasonably related' standard articulated in Oubichon [v. North American Rockwell Corporation (9th Cir. 1973) 482 F.2d 569, 571], recognizing that to do otherwise would create a 'needless procedural barrier' (id., at p. 571) to enforcement of FEHA. (Cf. Jones v. Los Angeles Community College Dist. (1988) 198 Cal.App.3d 794,810 . . .; Baker v. Children's Hospital Medical Center, [supra], 209 Cal.App.3d 1057, 1064 . . .; Van Pool v. City and County of San Francisco (N.D. Cal. 1990) 752 F.Supp. 915, 924; Albano v. Schering-Plough Corp. (9th Cir. 1990 912 F.2d 384, 386-388; see also Kahn v. Pepsi Cola Bottling Group (E.D.N.Y. 1981) 526 F.Supp. 1268.)" (Sandhu v. Lockheed Missiles & Space Co. (1994) 26 Cal.App.4th 846, 859.) Applying that standard to the facts of the case, we find that Leland's claim of "other illegal discrimination," in view of his claims of racial discrimination in 1988 and 1990, would likely have encompassed a claim of retaliatory discrimination. Nonetheless, defendants argue that there is no evidence in the record which supports a finding that the trial court issued an order denying Leland the opportunity to present such claim. We agree. Even during the side bar discussion when the attorney for the defendants stated that he wanted to withdraw the question (which prompted the side bar) as phrased, Leland responded, "But it's my understanding we wouldn't get into the retaliation -- well, you are asking the questions." Thus, according to the record of

the trial, Leland failed to introduce evidence of retaliatory discrimination during his examination of the witnesses, or when the opportunity presented it during cross-examination. Such failure amounted to error on Leland's part, not the trial court's.

Next, Leland argues that because the jury's decision was "in the form of a special verdict which called for a finding of 'intentionally [sic] discrimination against [plaintiff]', it is impossible to tell whether the . . . jurors were influenced against [him] by the erroneous burden of proof instruction . . . " We disagree.

The following instruction was read to the jury:

"The plaintiff must show that a defendant intentionally discriminated against him because of his race or age.

". . . . . .

"In order to find for the plaintiff, you must find from all the evidence that the plaintiff has proved by a preponderance of the evidence that the defendants' failure to promote him was because of his race or age, even if that was not the only reason.

"It is not necessary for the plaintiff to prove that race or age was the sole or exclusive reason for the defendants' decision to not promote him. There may be more than one factor in defendants' decision relating to the plaintiff. But plaintiff is, nevertheless, entitled to recover if he establishes by a preponderance of all the evidence a casual

[sic] connection between his race or age and his adverse employment action.

". . . . . .

"You must evaluate the evidence offered in this case as follows:

"One, it is the plaintiff's burden to produce evidence which is sufficient to allow you to infer that the decision to not promote the plaintiff was made because of his race or age, as will be explained . . . .

". . . . . .

"Two, if you find that it is more likely than not that the defendants' actions were motivated at least in part by the plaintiff's race or age, the defendant[s] must come forward with evidence to explain or articulate a reasonable non-discriminatory basis for the action taken against the plaintiff.

". . . . . .

"Three, if you find that the defendant [sic] has articulated a reasonable non-discriminatory reason for its actions against the plaintiff, it then becomes the plaintiff's burden to prove by a preponderance of the evidence to show that the defendants' reasons were not true or are as a pretext for race or age discrimination . . . ."

The above instruction correctly informed the jury of the respective burdens of each party. (Clark v. Claremont University Center (1992) 6 Cal.App.4th 639, 663-665; Watson v. Department of Rehabilitation, supra, 212

Cal.App.3d 1271, 1290; Mixon v. Fair Employment & Housing Com. (1987) 192 Cal.App. 3d 1306, 1318-1319.)

Moreover, if Leland's complaint is directed at the "intentional" language in the special verdict, his argument still fails. It was always Leland's "ultimate burden of persuading the court that [he] has been the victim of intentional discrimination." (Texas Dept. of Community Affairs v. Burdine (1981) 450 U.S. 248, 256.) Even if he makes it through the three steps described in the instructions, "the factfinder must decide upon all of the evidence before it whether defendant[s] intentionally discriminated against [him]." (Mixon v. Fair Employment & Housing Com., supra, 192 Cal.App.3d 1306, 1319.)

Finally, Leland complains of the dismissal of John Ryan as a party defendant. The trial court found that because Leland failed to name Mr. Ryan in his DFEH complaint he (Leland) was barred from naming him (Ryan) in this civil action. We find no error in this action. (Valdez v. City of Los Angeles (1991) 231 Cal.App.3d 1043, 1060-1061 [failure to name individual defendants in the administrative complaint is fatal to the right to bring an action against them in the trial court][2])

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[2]We note that in Saavedra v. Orange County Consolidated Transportation Etc. Agency (1992) 11 Cal.App.4th 824, our colleagues in the Division Three of this District declined to follow Valdez for two reasons. First, the individual defendants in Valdez had not been named either in the caption or the body of the claim,

IS THERE SUBSTANTIAL EVIDENCE TO SUPPORT THE VERDICT?

Having disposed of Leland's preliminary contentions, we now turn to his primary claim that the judgment is not supported by substantial evidence in the record.

Leland challenges the trial court's refusal to grant his motion for judgment notwithstanding the verdict contending that there was substantial evidence to support his claims of discrimination. "The test for measuring a motion for judgment notwithstanding the verdict is set out in Hauter v. Zogarts (1975) 14 Cal.3d 104, 110 . . .: 'The trial judge's power to grant a judgment notwithstanding the verdict is identical to his power to grant a directed verdict. [Citations.] The trial judge cannot weigh the evidence (Quintal v. Larel Grove Hospital (1964) 62 Cal.2d 154, 159 . . .), or judge the

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whereas, in Saavedra, the only person with whom the plaintiff had dealt with was the individual defendant whose actions were those of the CTSA. Second, our colleagues found that the administrative form is itself ambiguous, i.e., a nonlawyer may not know to name the person who discriminated against him or her when the form merely asks for "THE EMPLOYER, LABOR ORGANIZATION, EMPLOYMENT AGENCY APPRENTICESHIP COMMITTEE, STATE OR LOCAL GOVERNMENT AGENCY . . . ." (Id., at p. 828, internal quotation marks omitted.)

In choosing to follow Valdez, and not Saavedra, we find that (1) Leland failed to identify Mr. Ryan in the caption or body of his claim, whereas his civil complaint identifies several individuals, including Mr. Ryan, responsible for Leland's alleged failure to be promoted; and (2) unlike a nonlawyer plaintiff, Leland has obtained a legal degree and has exhibited competence during his representation of himself during every stage of this litigation.

credibility of witnesses. [Citation.] If the evidence is conflicting or if several reasonable inferences may be drawn the motion for judgment notwithstanding the verdict should be denied. [Citations.] "A motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied." [Citation.]'" (Sprigg v. Garcin (1980) 105 Cal.App.3d 869, 873.)

Our review of the record convinces us that the trial court did not err in denying Leland's motion. There was no evidence or reasonable inference therefrom offered from which the jury properly could find that defendants had intentionally discriminated against Leland. Several witnesses testified that Leland was either not qualified for he position available, failed to timely submit an application, or faced stiffer competition.

No one ever told Leland that he was not considered for the available positions because of his age or race. Moreover, there is no evidence in the record which would show that the County intentionally discriminated against Blacks by refusing to promote them. Instead, the evidence is to the contrary, demonstrating that Blacks have obtained supervisory positions in the alcohol program.

Furthermore, the County utilizes an affirmative action policy which seeks, in

limited situations, to retain employees with a similar demographic background to the general population of Riverside County. The County's policy is limited to situations in which two or more candidates for a position are deemed to be equally qualified for a position and where more than seven County employees hold that type of position. If one of the equally-qualified candidates belongs to a group which is significantly under-represented among similarly-situated County employees ("under utilized"), the County will retain the candidate from the under-utilized group.

Nonetheless, Leland asserts that the testimonies of defendants' witnesses were inconsistent and should not have been believed; he argues that the jury should have believed his testimony. However, that is not an argument which may be made on appeal. Thus, Leland's claim must be rejected.

DISPOSITION

The judgment is affirmed.

NOT FOR PUBLICATION

HOLLENHORST

J.

We concur:

RAMIREZ
P.J.

McDANIEL
J.*

*Retired Associate Justice of the Court of Appeal sitting under assignment by the Chairperson of the Judicial Council.

APPENDIX B

Fourth Appellate District, Division Two

E012025

IN THE

SUPREME COURT OF CALIFORNIA

S048964

FREDRICK L. LELAND, Appellant,

v.

COUNTY OF RIVERSIDE, et al., Respondents.

Appellant's petition for review DENIED.

SUPREME COURT. FILED November 1, 1995

/s/Robert Wandruff, Clerk

/s/LUCAS
Chief Justice